



U.S. Citizenship
and Immigration
Services

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MAY 11 2006

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of of the Foreign Residence Requirement under Section 212(e)
of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a citizen of China who is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant was admitted to the United States in J2 nonimmigrant exchange status on January 2, 2001, based on her prior husband's J1 nonimmigrant exchange status, and is subject to the two-year foreign residence requirement. The applicant's spouse is a U.S. citizen and the applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse. The AAO notes that the director stated that the applicant changed status from J2 to J1, however, there is no indication of this change of status in the record.

The director determined that the applicant failed to establish her spouse would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in China. *Director's Decision*, dated November 9, 2005. The application was denied accordingly.

On appeal, counsel asserts that the applicant did not know of the two-year foreign residence requirement until after she married her current spouse, and that exceptional hardship will be imposed on the applicant's spouse. *Brief in Support of Appeal*, at 1-2 dated December 30, 2004.

The record includes, but is not limited to, counsel's brief and previous cover letter, the applicant's affidavit and the applicant's immigration documents. The entire record was considered in rendering this decision.

Counsel asserts that the applicant did not sign the Form DS-2019 or IAP-66 and did not know about the two-year foreign residence requirement until after she married her current spouse and consulted attorneys to assist with processing her adjustment of status application. *Brief in Support of Appeal*, at 1. The AAO notes that the applicant's J2 visa stamp, which was issued nearly three years before she married her U.S. citizen spouse, clearly states that the two-year rule applies. *Applicant's Visa Stamp*, dated November 17, 2000. Furthermore, ignorance of the law is not an excuse which can be used to exempt one from the law.

Section 212(e) of the Act states in pertinent part that:

- (e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission
 - (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,
 - (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency [now the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

(iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [now, Citizenship and Immigration Services, CIS] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Homeland Security, "Secretary"] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General [Secretary] to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General [Secretary] may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "Therefore, it must first be determined whether or not such hardship would occur as the consequence of her accompanying him abroad, which would be the normal course of action to avoid separation. The mere election by the spouse to remain in the United States, absent such determination, is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed. Further, even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e), *supra*."

In *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause

personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad.” (Quotations and citations omitted).

The first step required to obtain a waiver is to demonstrate that the applicant’s spouse would suffer exceptional hardship if he moved to China for two years. Counsel states that the applicant’s spouse was born and raised in the United States and he will encounter extreme difficulties due to language differences, lower living conditions, discrimination and cultural barriers. *Attorney Letter*, at 1-2, dated June 18, 2004. Counsel states that the applicant’s spouse is close with his ailing parents and his brothers and sisters. *Id.* at 4. The types of issues cited by counsel are unfortunate, but are common to those who move to a foreign country for two years. Counsel asserts that the applicant’s spouse is a carpenter and relocation will cause an adverse impact on his career. *See id.* at 1-2. The AAO notes that there is no indication that the applicant’s spouse will be unable to find employment in his field upon return to the United States. Counsel states that it will be impossible for the applicant’s spouse to find employment and even if the applicant works, they will face severe financial difficulties. *Id.* Counsel points out that the couple would move to Beijing, which has a high consumer price index, and it will be difficult for the applicant to find employment. *Brief in Support of Appeal*, at 2. The AAO notes that there is no documentation to support a claim of financial hardship other than the general report on consumer price index. Counsel asserts that the applicant’s spouse will be unable to practice the Catholic religion in China and his family may face danger due to his beliefs. *Attorney Letter*, at 2-3. However, the record does not support this statement. The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, based on the evidence contained in the record, the AAO finds that the applicant has failed to establish that her spouse would suffer exceptional hardship if he moved with her to China.

The second step required to obtain a waiver is to demonstrate that the applicant’s spouse would suffer exceptional hardship if he remained in the United States during the two-year period. Counsel asserts that it would be expensive to maintain two households and it would be impossible for the applicant’s spouse to visit **China on a regular basis due his current financial situation.** *Id.* Counsel states that the long-distance communication will place a financial burden on the couple and their relationship will be endangered. *Id.* The AAO notes that there is no documentation to support the claims of financial hardship. Therefore, based on the record, the AAO finds that the applicant has also failed to establish her spouse would suffer emotional or financial hardship beyond the anxiety and loneliness ordinarily anticipated from a two-year separation, if he remained in the U.S. while the applicant returned temporarily to China.

Based on the totality of the record, the applicant’s departure from the United States would not impose exceptional hardship upon her spouse if he relocates with her or remains in the United States during the two-year period.

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that in the present case, the applicant has not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed